United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7400

76-7400

In The

United States Court of Appeals

For The Second Circuit

B

Marian Gatefield,

Plaintiff-Appellee,

vs.

Advanced Computer Techniques Corporation,

Defendant-Appellant.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

B P/S

Reply Brief For Defendant-Appellant

Lewis & DeClemente
Attorneys for Defendant-Appellant
757 Third Avenue
New York, New York 10017
(212) 421-8837

Table of Contents

Table of Citations

Rebuttal to Appellee's Statement of Facts

Plaintiff's Statement of Facts omits, mistates and mischaracterizes several key portions of the record to create a false impression that plaintiff had a vested right to go on a leave of absence, and that she was fired only because of a crisis atmosphere which developed on June 2, 1976, due to the resignation of two other employees. The statement is a distortion:

1. Plaintiff omits the vital fact that her employment contract contained no provision at all for <u>any</u> leaves of absence (Exh. 3, 276a). This permission to go on a leave of absence was purely gratuitious and could, even if granted, be revoked.

2. Plaintiff omits her own admission that Mr. Lecht asked her to stay, but that she left anyway (127a/4-15).

3. Plaintiff omits the fact that her purported "replacement", Mr. Rosen, had not been approved by First National City Bank*-- an approval she admittedly knew was

---

* Hereinafter sometimes referred to as "FNCB".

contractually required for any COINS personnel changes (115a/23-116a/2; 116a/21-25).

4. Plaintiff attempts to create the impression that Mr. Lecht only decided to fire her on Monday, June 2, after he found out that Mr. Messenger, the COINS project manager, had resigned, and that the termination was a result of that fact and not plaintiff's disobedience. This is false and is contrary to the unrebutted testimony that Mr. Lecht had already made his decision to fire plaintiff on Monday, June 2, and that he "had thought about it on the weekend" (185a/16-23).

5. Plaintiff's attempts to avoid the admission made by her letter dated June 1, 1975, only compound her duplicity. On the one hand, she claims it was misdated because "she was upset" (Pl. Brief, p. 6) over receiving Mr. Lecht's termination letter dated June 2, 1975. On the other hand, however, she tries to explain away her

failure to respond to Mr. Lecht's charge that she took an unauthorized leave by claiming that "she believed defendant eventually would contact her since defendant's president had reneged on firing others previously" (Pl. Brief, p. 5). In other words, where being "upset" explains her actions, she was "upset"; where being composed and confident explains them, she was composed and confident--all at the same time.

I

Plaintiff's Brief Does Not Address the Central Issue to this Case: That Defendant had Ample Cause for Termination Within the Meaning of the Contract

The employment contract upon which plaintiff bases her claim provides, in relevant part

> "Notwithstanding anything hereinbefore contained Employer shall have the right to terminate this agreement immediately at any time for cause."
>
> (Pl. Exh. 3, para. 2(c))

The sole relevant issue as to liability is whether plaintiff was terminated "for cause."

In the case of Trans World Airlines, Inc. v. Beaty, 402 F. Supp. 652 (S.D.N.Y., 1975), the Court said

> "...a discharge for cause is ordinarily defined as a discharge for some reason which is not arbitrary or capricious. International Auto Sales & Service, Inc. v. General Truck Drivers, Chauffeurs, Warehousemen & Helpers, Local Union No. 270, 311 F. Supp. 3B (E.D. La., 1970)."
>
> (402 F. Supp. at 658)
> (emphasis supplied)

See also Wise v. Southern Pacific Co., 77 Cal. Rptr. 156, 167 ( ), where the Court said that a dismissal for cause was valid

> "...unless possibly the cause assigned be so frivolous that allminds must necessarily agree that it is not a legitimate cause."

By her own admission, Gatefield left on a leave of absence, despite the fact that Mr. Lecht, ACT's President, asked her to stay (127a/4-15).

By her own admission, Gatefield was a manager of the COINS project, an important project for ACT, but left in the middle of the project (295a (Exh. P) 282a (Pl. Exh. 5, ¶1)).

By her own admission, her alleged "replacement", Mr. Rosen, had not been approved by First National City Bank--a contractual requirement of which she was well-aware (115a/23-116a/6; 116a/21-25), yet she walked out anyway.

By her own admission, ACT, itself, was not satisfied that Mr. Rosen could do the job (68a/17-20), yet she walked out anyway.

These admitted and/or unrebutted facts show palpably that plaintiff's discharge was not arbitrary or capricious or frivolous.

Kirchof v. Friedman, 10 Ariz. App. 220, 457 p. 2d 760 (1969), is a very pertinent case because it deals with the question of cause, particularly in the context of a professional or managerial relationship, as existed in the case at bar. There, the Court affirmed a judgment for the defendant employer against plaintiff's claim for wrongful discharge because there was cause for discharge.

Plaintiff had been hired to manage a restaurant and had a written contract. Unlike Gatefield's contract, there was no provision for discharge, so the Court based its determination on a standard of willful disobedience, a stricter standard than the one at bar. Yet it found that the employer had such grounds. The situation was similar to the case at bar, especially as far as the expectations inherent to a relationship involving a manager or professional employee with his employer are concerned.

The basis for the discharge was that plaintiffs had been insubordinate and refused to obey suggestions

given by the defendant. Plaintiffs had

> "...rejected changes in the menu suggested by the defendant. Plaintiffs' advice to cancel newspaper advertising was rejected and certain matters concerning entertainment suggested by defendants were rejected by plaintiffs."
>
> (457 P. 2d at 762)
> (emphasis supplied)

The Court held that refusal to obey these suggestions constituted "insubordination" and hence "cause" for discharge (457 P. 2d at 764).

The case at bar presents a stronger case for insubordination and cause for discharge. Here Mr. Lecht did not merely "suggest" that Gatefield not take a leave of absence--as she admits, he asked her outright not to go and she disobeyed.* It also lays to rest the

---

* Kirchof is further strengthened as precedent because in the Kirchofs' contract it provided that the Kirchofs would have control over "day to day" management of the operations. Yet the Court held that while menu control, advertising and entertainment could be so considered under certain circumstances, it could not outweigh the employer's right to control policy. Here, plaintiff's observation of whether Mr. Rosen or anyone else could possibly replace her was even more subject to being overcome by defendant's compelling interest to satisfy its contract requirements with First National, to successfully carry out the innovative program, and to preserve this important client relationship.

semantical nuance that plaintiff speciously tries to create between the terms "ask" and "order".

It is thus clear that Gatefield's excuse that ACT did not "order" her to stay is of no moment and this Court should grant defendant judgment n.o.v., or, at the very least, a new trial.

II

Plaintiff Misstates the Applicable Legal Question for Resolving the Issue of Defendant's Right to a Judgment n.o.v.

Ms. Gatefield contends that in order to be entitled to a judgment n.o.v.

> "...defendant...must not only show that there was no evidence (or evidence believable by reasonable men) indicating that plaintiff was granted a leave of absence, but must also show that the evidence against the plaintiff was overwhelming and that the only possible inference from all evidence favorable to plaintiff is that she was not granted a leave of absence."
>
> (Pl. Brief, p. 8)

This myopic view of the issues ignores the basis of the relationship between the parties. Gatefield's employment contract gave her no right or claim to any leave of absence whatever at any time (Pl. Exh. 3).

When she asked for a leave of absence, she was asking for a gratuitious benefit from defendant--a benefit without consideration. As such, even if it were at one

time granted, which defendant denies, it surely could be countermanded, especially while she was in the midst of a highly desirable--and critical-- contract with First National City.

Gatefield does not and cannot address herself to her admission that when she left on her leave of absence she left against the wishes of defendant's president, Mr. Lecht.

> "Yes, he asked me not to leave of May 30."
>
> (127a/4)

Gatefield is not even willing to acknowledge her own words and contends that

> "...even if Lecht had asked plaintiff not to leave for a week, plaintiff would have been justified in leaving because she had been granted the leave, had worked on the project as agreed, a replacement had been found and plaintiff had made her plans to leave at that time."
>
> (Pl. Brief, p. 10)

This so-called "justification" is spurious.

-- A gratuitious grant of permission cannot, by definition, form justification to violate a revocation of permission.

-- Her working on the project "as agreed" was nothing more than her doing her job--for which she was well paid.

-- No replacement had been found since plaintiff admitted that any replacement for the COINS project would have to be approved by FNCB (115a/23-116a/2), and that Mr. Rosen had not been approved (116a/21-25). Moreover, not even ACT had approved Mr. Rosen (68a/17-20).

-- Her so-called "plans to leave at that time" were non-existent. Plaintiff had no set plans to leave and travelled on a standby basis since she got her tickets on a discount basis from her sister, who worked for British Airways.

Q. You didn't have any reservations to go back to England, did you?

A. No.

Q. All you did was go down to the airport and wait to get on a flight, any flight?

A. Yes.

Q. You were not committed to any ticket reservations of any kind, isn't that true?

A. Right.

(110a/14-22)

Thus, there was no "justification" whatsoever for plaintiff to leave, against the admitted request of defendant that she stay.

Plaintiff's only other attempts to justify her abandoning defendant in the midst of the COINS project was that Mr. Lecht only "asked" her to stay and did not "order" her to stay (Pl. Brief, p. 10).

In other words, plaintiff maintains that although she was willing to abandon ACT at a critical time; was willing to endanger its relationship with a major new client and risk the loss of a profitable follow-on contract--yet she would have honored all her commitments if only Mr. Lecht had used the correct nuance of speech. This is pure nonsense. Coming from a highly paid and experienced professional person with managerial responsibilities, it is patently incredible.

III

White v. Amman Is Persuasive That Defendant Is Entitled To a Judgment n.o.v.

In White v. Amman, 22 A.D. 2d 674 (1st Dept., 1964), the Appellate Division granted the defendant-employer a judgment n.o.v., because the record showed he had gone on an unauthorized leave of absence. It is directly in point.

Plaintiff's attempts to distinguish White are unconvincing.

Plaintiff complains that in White there was "documentary evidence" that White took an unauthorized leave of absence, but that here there is no documentary evidence. Plaintiff overlooks the fact that she admitted in open court that she left against defendant's wishes. This admission is of greater probative force than anything in White since it is a binding judicial admission.*

Plaintiff also contends that if White had been a Federal case, "there might have been no reversal" since

---

* By "documentary evidence" plaintiff simply means written material that, in White, evidenced an inconsistency in his after-the-bell claim for breach. That kind of evidence is equally strong here where Ms. Gatefield failed at any time to refute Mr. Lecht's letter terminating her for cause (in White the Court said 30 days was too long to be credible). See below.

the New York Appellate Division has authority under CPLR 5501(c) to substitute its findings of fact for the trial court's findings.

What Ms. Gatefield is saying is that a Federal appellate court cannot grant a judgment n.o.v., because whenever such a judgment is made it implicitly overturns findings of fact made at trial. But that's the whole point of a judgment n.o.v.--a determination that the findings below are unreasonable. As plaintiff points out in her brief, citing Sotell v. Maritime Overseas, Inc., 472 F. 2d 794 (2nd Cir., 1973), a judgment n.o.v. is appropriate when "...the evidence when viewed in the light most favorable to the appellee, would be such that reasonable men could not find for the defendant." (Pl. Brief, p. 7) When this occurs, the appellate court must reject the findings below and, in granting the judgment n.o.v., effectively make new findings.

There is, thus, no difference between White and any Federal case on appeal and plaintiff's attempts to distinguish it are attempts at obfuscation.

The eason for those attempts to wriggle out of the plain and salient rulings in White are clear--White

is devastating to plaintiff's case. It shows that where an employee claims to have gone on an authorized leave of absence and is notified in writing by the employer that the leave is unauthorized, but does not contest the employer's claim, it is unreasonable, as a matter of law, to believe that later protestations are bona fide.

The Appellate Division was simply saying that it just would not awallow a story that an employee who claimed that he was in the right would not respond immediately to his employer's written notice that his actions were unauthorized.

This is precisely what happened here. Plaintiff claims that she went on an authorized leave of absence, but when she received her letter of discharge did not even attempt to rebut its specific contentions that her leave was unauthorized.

These facts are on all fours with White, and this Court should not swallow plaintiff's story here either.

IV

Defendant Did Comply With Rule 50(b)

Plaintiff's contention that defendant did comply with Rule 50(b) is false.

Immediately at the conclusion of plaintiff's case, the defendant rose to make its motions, but the Judge directed that they be made "later".

Mr. Ferney: I rest

Mr. Lewis: Will your Honor entertain motions?

The Court: Not at this time. I will hear them later as though made now (140a-20).

At the conclusion of the trial, the Court directed defendant to make its motions within ten days (247a/10-12) and defendant did so (256a).

V

This Court Has Power To Order a New Trial

In an attempt to block this Court's review of the record, Ms. Gatefield now claims that this Court is without power to grant a new trial based on the weight of the evidence.

Plaintiff reaches this conclusion by confusing appealability with reviewability. The distinction and the rule are set out in 6A Moore's (2nd ed., 1974) ¶59.15[3]:

> "While review may under impelling circumstances be had through the medium of a prerogative writ, ordinarily an order denying or granting a new trial is not reviewable in that manner. And usually the order is non-appealable; but it is reviewable on appeal from a final judgment or other appealable order."
>
> (emphasis supplied)

This appeal is from a final judgment and the issue of defendant's right to a new trial is reviewable.

VI

Admission of Evidence of Plaintiff's Expenses Was Erroneous and Prejudicial

Gatefield reaches back to 1919 for a case with dicta allegedly contrary to ACT's position and claims that the case of Goldman v. City Specialty Stores, Inc., 285 App. Div. 880 (1st Dept., 1955), must, therefore, be "disregarded".

Plaintiff relies on Dan Norske Ameriekalirje v. Son Printing, 226 N.Y. 1 (1919), which had nothing to do with employment contracts and dealt with a libel action, and Kraut v. Morgan & Brother Stor., which was an action for damages for stolen goods.

By contrast, defendant's authority Goldman v. City Specialty Stores, Inc., supra, and Amerducci v. Metropolitan Opera Assn., Inc., 33 A.D. 2d 542, 543 (1st Dept., 1969), are in point and hold that the "optimum measure" of damages for wrongful discharge is lost salary for the unexpired term, and that it is prejudicial error to admit evidence of damages in excess of this amount.

VII

The Judgment should be Reduced by the Amount of Unemployment Compensation

It requires no citation to say that the object of damages for breach of contract is to place the plaintiff in the position she would have been in had the breach not occurred. This is basic and fair.

By contesting the issue of diminution of the award for money already received for unemployment benefits, plaintiff seeks a double payment--all at defendant's expense.

Plaintiff cites only one case to support this position and that case is clearly distinguishable.

In Sporn v. Celebrity, Inc., 129 N.J. Super. 449 (Law Div., 1974), the Trial Court applied New Jersey, not New York, law because "the applicability of New York law was not raised before or during trial" (129 N.J. Super. at 451).

The Court noted the distinction that under New York law unemployment insurance is paid for by the employer,

but under New Jersey law it is paid for by both the employer and the employee (129 N.J. Super. at 454). Thus, when the Court said that the payment of unemployment compensation should not be deducted from the lost wages, it was saying that the employee need not disgorge insurance payments which he, himself, paid for, at least in part.

In New York, by contrast, permitting Gatefield to retain lost wages plus unemployment benefits results in a windfall to her and a double payment by defendant--a result which is clearly unfair.

Plaintiff also attempts to mischaracterize the reasons for there being no figure in the record for the amount of unemployment benefits received by plaintiff. ACT had requested this information, but the Trial Court blocked that information from coming out (123a/14-22). In any event, it is a matter of record, and uncontested that she received $95 per week from the first week of July, 1975 to the end of March, 1976.

Conclusion

For the above reasons, it is respectfully requested that ACT be granted judgment n.o.v. or, in the alternative, a new trial or, in the alternative, a diminution of the verdict by the amount of unemployment benefits plaintiff collected.

Lewis & DeClemente, Esqs.
Attorneys for Advanced
Computer Techniques Corp.
757 Third Avenue
New York, New York 10017

By _____
Paul Z. Lewis
(a member of the firm)

State of New York)
: ss.:
County of New York)

Paul Z. Lewis, being duly sworn, deposes and says, that deponent is not a party to the action, and is over 18 years of age.

That on the 8th day of December, 19 76 deponent served the within Reply Brief For Defendant-Appellant on

Ralph R. Ferney, Esq.
299 Park Avenue
New York, New York 10017

the address designated by said attorney for that purpose by depositing same enclosed in a postpaid properly addressed wrapper in an official depositary under the exclusive care and custody of the United States Post Office department.

Paul Z. Lewis

Sworn to before me this 8th
day of December, 19 76

Linda A. Dickinson

Linda A. Dickinson, Notary Public
State of New York
No. 31-4632580
Qualified in New York County
Commission Expires March 30, 1978